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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 117

FEDERAL COMMUNICATIONS COMMISSION, APPELLANT

v.

AMERICAN BROADCASTING COMPANY, INC.

No. 118

FEDERAL COMMUNICATIONS COMMISSION, APPELLANT

v.

NATIONAL BROADCASTING COMPANY, INC.

No. 119

FEDERAL COMMUNICATIONS COMMISSION, APPELLANT

v.

COLUMBIA BROADCASTING SYSTEM, INC.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

OPINIONS BELOW

The Report and Order of the Federal Communications Commission adopting the rules in is-

sue (R. 161) and the rules (R. 169) appear at 14 F. R. 5429. The opinions of the United States District Court for the Southern District of New York (R. 110) are reported at 110 F. Supp. 374.

JURISDICTION

The judgments of the court below (Clark, J., dissenting) were entered on March 11, 1953 (R. 138, 238, 296). Petitions for appeal therefrom were filed on May 8, 1953, and were allowed on the same day (R. 140, 239, 298). On October 12, 1953, this Court noted probable jurisdiction and consolidated the cases for argument (R. 307). The jurisdiction of this Court rests on 28 U. S. C. 1253 and 2101 (b).

QUESTION PRESENTED

The district court sustained in part and, by a divided vote, set aside in part certain rules adopted by the Federal Communications Commission pertaining to the licensing of radio and television stations which engage in the broadcast of lotteries. The rules adopted by the Commission represent an interpretation of Section 1304 of the Criminal Code, 18 U. S. C. 1304, which prohibits the broadcast of lotteries, gift enterprises, and other similar schemes. The question presented on these appeals is:

Whether subdivisions (2), (3), and (4) of paragraph (b) of the rules, which delineate the element of lottery consideration in terms of required or in-

duced attention to radio or television programs, constitute a correct interpretation of 18 U. S. C. 1304.

STATUTE INVOLVED

18 U. S. C. 1304 is set out at page 9, *infra*.

STATEMENT

The appellees, American Broadcasting Company, Inc. (ABC), National Broadcasting Company, Inc. (NBC), and Columbia Broadcasting System, Inc. (CBS), are the licensees of radio and television broadcast stations subject to regulation by the Federal Communications Commission. These actions were brought by them against the United States and the Federal Communications Commission to set aside the Report and Order of the Commission adopted August 18, 1949, and released August 19, 1949 (14 F. R. 5429; R. 161), which adopted rules pertaining to the broadcast of lotteries. Sections 3.192, 3.292 and 3.656[1] of the Commission's Rules and Regulations.

The rules, which are identically worded and apply, respectively, to commercial standard broadcast (AM), FM broadcast and television broadcast stations, provide:

> (a) An application for construction permit, license, renewal of license, or any other

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[1] Section 3.656 was originally Section 3.692. It was renumbered by the Commission's Sixth Report and Order in Docket No. 8736, et al., adopted April 11, 1952 (17 F. R. 3905).

authorization for the operation of a broadcast station, will not be granted where the applicant proposes to follow or continue to follow a policy or practice of broadcasting or permitting "the broadcasting of any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes." (See 18 U. S. C. § 1304.)

(b) The determination whether a particular program comes within the provisions of subsection (a) depends on the facts of each case. However, the Commission will in any event consider that a program comes within the provisions of subsection (a) if in connection with such program a prize consisting of money or thing of value is awarded to any person whose selection is dependent in whole or in part upon lot or chance, if as a condition of winning or competing for such prize:

(1) such winner or winners are required to furnish any money or thing of value or are required to have in their possession any product sold, manufactured, furnished or distributed by a sponsor of a program broadcast on the station in question; or

(2) such winner or winners are required to be listening to or viewing the program in question on a radio or television receiver; or

(3) such winner or winners are required to answer correctly a question, the answer to which is given on a program broadcast over the station in question or where aid to answering the question correctly is given on a program broadcast over the station in question. For the purposes of this provision the broadcasting of the question to be answered over the radio station on a previous program will be considered as an aid in answering the question correctly; or

(4) such winner or winners are required to answer the phone in a prescribed manner or with a prescribed phrase, or are required to write a letter in a prescribed manner or containing a prescribed phrase, if the prescribed manner of answering the phone or writing the letter or the prescribed phrase to be used over the phone or in the letter (or an aid in ascertaining the prescribed phrase or the prescribed manner of answering the phone or writing the letter) is, or has been, broadcast over the station in question.

After the promulgation of the rules, appellees brought the present actions in the court below, seeking a permanent injunction against their enforcement.[2] The district court granted a tem-

[2] The actions were brought under Section 402 (a) of the Communications Act of 1934, 48 Stat. 1064, 1093, as amended, 47 U. S. C. 402 (a); 28 U. S. C. 1336, 1398, 2284, 2321–5; and Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. 1009.

Public Law 901, 81st Cong., 2d Sess., 64 Stat. 1129, 5 U. S. C. 1031, *et seq.*, has since changed the procedure under

porary restraining order, after which the Commission issued an order, on September 21, 1949, suspending the effective date of the rules pending a final determination of the litigation. The cases were consolidated for hearing, and were heard by the district court upon motions for summary judgment by appellees (ABC, R. 90; NBC, R. 224; CBS, R. 282) and motions by the Government to dismiss the complaints or, in the alternative, for summary judgment (R. 90–91, 232–233, 290–292).[3]

The district court handed down its decision on February 5, 1953 (R. 110), sustaining the Commission's general authority to adopt rules of the character involved. And paragraphs (a), and (b) (1) of the rules were sustained as correct interpretations of 18 U. S. C. 1304. Subdivisions (2), (3), and (4) of paragraph (b) of the rules were held invalid.

Circuit Judge Clark dissented from that part of the decision setting aside subdivisions (2), (3), and (4) of paragraph (b).

Section 402 (a) of the Communications Act to provide for review by courts of appeals rather than by district courts. That procedure is inapplicable to actions, such as the present ones, which were commenced prior to its enactment. Section 14.

[3] An additional motion to strike paragraphs 13, 14 and 16 of the NBC amended complaint (R. 232–233) on the ground that the programs described therein were not within paragraph (b) of the rules was unopposed and was granted by the district court.

A. *The proceedings before the Commission*

The proceeding which culminated in the rules at issue was instituted as the fairest and most appropriate procedure for formulating the Commission's position on a matter which had been the cause of concern over a considerable period of time.[4] The widespread use of "give-away" programs during the 1940's by licensees caused concern on the Commission's part as to whether the programs were in violation of the then Section 316 of the Communications Act which prohibited the broadcast of any "lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance".[5] In 1940 the Commission submitted to the Attorney General for his consideration several programs which raised questions of violation of the statute. The Attorney General advised the Commission that

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[4] For early case, see *WRBL Radio Station, Inc.*, 2 F. C. C. 687.

[5] Section 316 provided: "No person shall broadcast by means of any radio station for which a license is required by any law of the United States, and no person operating any such station shall knowingly permit the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes. Any person violating any provision of this section shall, upon conviction thereof, be fined not more than $1,000 or imprisoned not more than one year, or both, for each and every day during which such offense occurs."

action by the Department of Justice was not believed to be warranted. The Department did not state its reasons for this conclusion.[6]

After the war, on October 6, 1947, the Commission instituted an investigative proceeding with respect to a program called "Dollars for Answers" broadcast by station WARL, Arlington, Virginia, to determine if the program was in violation of Section 316. On this program, broadcast at half-hour intervals through the day, persons chosen at random were called by telephone and asked a question, a correct answer to which entitled them to a prize. A different question was used for each broadcast, and both the question and answer were broadcast by the station prior to each call. The matter was heard before an examiner, who issued a Recommended Report holding that the program was in violation of the statute. *Northern Virginia Broadcasters, Inc.,* 4 Pike & Fischer, R. R. 662.

While the *Northern Virginia Broadcasters* proceeding was still pending, the Commission decided to institute a general rule-making proceeding rather than handle the problems presented in this field on a case-to-case basis. Adoption of the rule-making procedure made it possible for all interested parties to submit their views on a matter of general interest to all broadcast

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[6] See Exhibits E–1 through J–2, Affidavit of G. D. Zorbaugh, in support of motion of American Broadcasting Company, Inc. for summary judgment (R. 30–63).

licensees, and avoided the possible hardship of an adverse determination in an individual licensing proceeding. Accordingly, on August 5, 1948 a notice of proposed rule making was released (R. 157).[7] The notice referred to Section 316 of the Communications Act, *supra.* It recited that the proposed rules were intended to afford licensees as specific advance information as possible of the types of programs believed to be in violation of the Act. On June 25, 1948 Section 316 was removed from the Communications Act and recodified with editorial changes in language as 18 U. S. C. 1304, effective September 1, 1948. This took place as a part of the recodification of Federal criminal law and the enactment of Title 18 as positive law.[8] The Commission issued a Supplemental Notice of Proposed Rule Making on August 27, 1948, re-

[7] "In the Matter of Promulgation of Rules Governing the Broadcast of Lottery Information," Docket 9113.

[8] Public Law 772, 80th Cong., 2d Sess., 62 Stat. 683, 763. The section provides: "Whoever broadcasts by means of any radio station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

"Each day's broadcasting shall constitute a separate offense."

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ferring to this change and requesting comments on the proposed rules from interested persons (R. 159). The Notice concisely set forth the Commission's statutory authority and its duty to implement the policy of Congress that licensed stations not be permitted to broadcast lotteries. It also stated that an oral argument or hearing would be held if warranted by any of the comments filed.

Comments and briefs were filed by a number of parties, including the appellees herein. These written submissions went to the authority of the Commission to adopt the proposed rules, the proper interpretation of 18 U. S. C. 1304, and the policy involved.

On October 19, 1948 the Commission *en banc* heard oral argument on the proposed rules, in which appellees and eight other parties participated. After consideration of the written comments and the oral argument,[9] the Commission, one Commissioner dissenting, on August 18, 1949 adopted its Report and Order promulgating the rules in issue (R. 161). The rules adopted were somewhat altered from the proposed rules in light of the comments received. The Report and Order discussed the reasons for adoption of the rules and the objections which had been raised to

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[9] The briefs and comments submitted to the Commission, and the transcript of the oral argument, were filed as Exhibit A to an affidavit in support of the Government's motions, but have been omitted in printing.

them. It pointed out that Section 1304, which prohibits the broadcast of lotteries and similar schemes by stations licensed by the Commission, is a declaration of policy by Congress directly applicable to exercise of the Commission's authority and duty to grant broadcast licenses only if public interest, convenience, and necessity will thereby be served. The Commission's rules, promulgated pursuant to its licensing and rule-making powers, were designed to give effect to the policy of Section 1304, under the statutory standard of public interest and necessity governing all grants of broadcast licenses. The Commission concluded that it was empowered to issue the rules and that they would serve the useful purpose of providing guidance to broadcast licensees.[10] The Report and Order states (R. 161–162):

> These rules set forth for the guidance of all broadcast licensees and other interested persons the Commission's interpretation of Section 1304 of the United States Criminal Code (18 U. S. C. 1304) prohibiting the broadcast of any lottery, gift enterprise, or similar scheme which the Commission intends to follow in licensing proceedings in determining whether an applicant for a station license or renewal

[10] On October 28, 1949, the proceeding involving station WARL was dismissed in view of the adoption of the new rules and the present litigation in which the pertinent issues of law were presented for adjudication. *Northern Virginia Broadcasters, Inc.*, 4 Pike & Fischer, R. R. 660.

thereof is qualified to operate his station in the public interest.

B. *The decision below*

Both the Commission's statutory authority to adopt the rules and the interpretation of 18 U. S. C. 1304 which they contain were challenged below. The questions raised by appellees in the district court were essentially the following:

1. Whether the Federal Communications Commission has statutory authority to adopt regulations (a) interpreting a criminal statute (18 U. S. C. 1304) pertaining to the broadcast of information as to lotteries, gift enterprises, and other similar schemes, and (b) providing that the Commission will deny licenses to those who follow a practice of violating the statute as thus interpreted.

2. Whether the regulations properly interpret the criminal statute.

3. Whether the regulations constitute an abridgement of freedom of speech, or are otherwise unconstitutional, or contravene Section 9 (a) of the Administrative Procedure Act.

The district court unanimously sustained the validity of the rules in all respects other than the interpretation of lottery consideration contained in subdivisions (2), (3), and (4) of paragraph (b) (R. 110). It held that the rules had been adopted through a rule-making procedure con-

forming to the Administrative Procedure Act, and that the rule-making process was properly utilized in connection with the Commission's licensing functions to prevent the issuance of licenses to those violating a criminal law specifically applicable to the operation of licensed radio and television facilities. Communications Act of 1934, as amended, Sections 4 (i), 303 (r), 307 (a), 308, 309 (a), 312.[11] Section 9 (a) of the Administrative Procedure Act, prohibiting unauthorized sanctions, was found to be inapplicable. *Regents of Georgia* v. *Carroll,* 338 U. S. 586 (R. 121–123).

The district court also held that the rules do not violate the First Amendment to the Constitution insofar as they are within the criminal statute they interpret,[12] nor the Fifth or Sixth

[11] Sections 308, 309 and 312 were amended in particulars not relevant to this action subsequent to the adoption of the rules by the Communications Act Amendments, 1952, 66 Stat. 711, *et seq.* With respect to the Commission's authority, see *Federal Communications Commission* v. *WOKO, Inc.*, 329 U. S. 223; *Stahlman* v. *Federal Communications Commission*, 126 F. 2d 124 (C. A. D. C.); *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, cited below. See also, *National Broadcasting Co.* v. *United States*, 319 U. S. 190; *Southern S. S. Co.* v. *Labor Board*, 316 U. S. 31; *Mester* v. *United States*, 70 F. Supp. 118 (E. D. N. Y.), affd., 332 U. S. 749.

[12] Citing *In re Rapier*, 143 U. S. 110; *Horner* v. *United States*, 147 U. S. 449; *Donaldson* v. *Read Magazine*, 333 U. S. 178; *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 227; *Johnston Broadcasting Co.* v. *Federal Communications Commission*, 175 F. 2d 351 (C. A. D. C.).

Although the district court's opinion states that the rules

Amendments (R. 129–131). Claims of violation of Article III, Section 2, Clause 3 of the Constitution (criminal trial by jury), and Article 1, Section 9, Clause 3 (bills of attainder), were also found to be without merit (R. 131).

With respect to the interpretative portions of the rules, the district court found that programs covered by them contain the elements of chance and prize within the meaning of Section 1304.[13] On the question of consideration, subdivision (1) of paragraph (b) was also found to be a proper interpretation of the criminal statute in denominating as consideration the furnishing of money or any thing of value, or the possession of a sponsor's product (R. 132).

In these rulings on paragraphs (a) and (b) (1) of the rules, the district court thus sustained

may be considered a form of censorship to the extent that they go beyond Section 1304 with respect to the element of consideration, this question is unnecessary of decision since the rules are specifically intended to interpret the criminal statute and do not purport to go beyond it. If the rules do go beyond the statute, they fall for that reason and no constitutional question is reached.

[13] No issue was presented as to prize. The Commission's position on chance was that the *entire* scheme by which winners are chosen will be considered in determining the part, if any, played by chance. Thus, where the selection of the ultimate winner occurs in two stages—i. e., the selection of a small group from a larger one followed by the selection of a winner from the small group—the method of selection at each stage must be scrutinized to determine if the selection is effected by chance. The language of the rule is essentially that of 18 U. S. C. 1304, and the validity of a particular scheme must turn upon the facts of the particular case.

both the Commission's authority to adopt the rules and its interpretation of the basic statute prohibiting the broadcast of lotteries. Subdivisions (2), (3) and (4) of paragraph (b), however, were found to be an improper interpretation of Section 1304, Circuit Judge Clark dissenting from this portion of the decision. These subdivisions cover those instances where participants are required, directly or indirectly, to listen to (or view) the programs of commercial broadcast stations as a condition of being eligible to win a prize. The majority below ruled that such schemes would not come within 18 U. S. C. 1304 on the ground that the statute contemplates only a valuable consideration, a "price" or "thing of value" to be weighed in terms of the value to the participant of what he gives (R. 125).

Judge Clark, dissenting, emphasized that the statute is broadly drawn. He pointed out that Section 1304 prohibits not merely lotteries, but gift enterprizes and any "similar scheme" offering prizes dependent upon chance, and that it does not mention consideration. Judge Clark stated (R. 134–135):

> My brothers, it seems to me, are drawn away from the natural answer by the odd mistake that what is involved as the "price" or "valuable consideration" (terms themselves constituting an over-precise formulation of the issue, as I have pointed out) is not value "to the station or sponsor,"

but "It is the value to the participant of what he gives that must be weighed." Of course, the participant must yield something; if he is quite supine, there would be a gift. But surely the application made by my brothers quite inverts the requirement and makes it meaningless and irrational. It is what the operator receives—in terms of value to himself—which must necessarily mark the difference between a gift and a chance, between altruism and business. The opinion appears to hold that while receiving the benefit of something as valuable as this radio time does not cast doubt upon the sponsor's altruism, yet the participant's expenditure of any pecuniary amount—even "a cent," see note 5 of the opinion—makes the scheme at once illegal. And the amount given need not even go to the operator. Such a view not only makes evasion easy and enforcement in natural course difficult, if not impossible; it also—and I say this with deference—makes the whole approach irrational. To say that here we have pure donation, whereas we would have a lottery if the participant were required to deposit a penny in a collection plate, or even a dime in a March-of-Dimes kettle, just does not make sense. The applicable test is not any strict doctrine of yielding a symbolic peppercorn to formalize a contract or a conveyance. It is a practical one, perceptive of the fact that the yield to the operator is surely all important. And this is recog-

nized in the well reasoned cases, such as *State* v. *Wilson,* 109 Vt. 349, 196 A. 757, cited below.

SPECIFICATION OF ERRORS TO BE URGED

The district court erred:

1. In holding that subdivisions (2), (3) and (4) of paragraph (b) of Sections 3.192, 3.292 and 3.656 of the Rules and Regulations of the Federal Communications Commission adopted in its Report and Order of August 18, 1949 go beyond, and constitute an incorrect interpretation of, Section 1304, Title 18, United States Code and are an unlawful exercise of the rule making power.

2. In granting appellees' motions for summary judgment in part by permanently enjoining the Federal Communications Commission from enforcing said subdivisions (2), (3) and (4) of paragraph (b) of Sections 3.192, 3.292 and 3.656 of the Commission's Rules and Regulations and, to that extent, vacating and setting aside the Commission's order adopting said Rules.

3. In denying the motions to dismiss the amended complaints or, in the alternative, for summary judgment in favor of appellant, to the extent that the Court did so in denying the motions to dismiss the amended complaints and in granting appellant's motions for summary judgment only in respect to paragraphs (a) and (b) (1) of Sec-

tions 3.192, 3.292 and 3.656 of the Commission's Rules and Regulations.

SUMMARY OF ARGUMENT

In 18 U. S. C. 1304, Congress has prohibited the broadcast of all lotteries and similar schemes offering prizes dependent in whole or in part upon lot or chance. This statute, as is the case with all Federal anti-lottery legislation, is broadly drawn and does not in terms make consideration a requisite of the prohibited schemes. To the extent that consideration may be read into the statute as inherent in the lottery concept, it is present in the so-called give-away programs covered by the Commission's rules at issue.

Radio and television give-aways are not altruistic undertakings. Like all other lottery schemes, their purpose and effect is to derive a profit from an appeal to the cupidity and gambling instinct of the participants. These participants are not the passive recipients of munificent gifts. On the contrary, the lure of a large prize is held out to induce affirmative action which is of substantial benefit to both station and advertiser. Such indirect consideration is a staple of numerous schemes devised to stimulate otherwise legal sales of products and services by adding the lottery ingredient. Schemes embodying such indirect consideration have consistently been held illegal by the better reasoned decisions in the field. These decisions have rejected the test of considera-

tion adopted by the majority below: that there must be a "price" or "thing of value" paid by the participants in order to have a lottery or similar scheme.

Congress indicated its purpose to strike at all forms of lotteries and similar schemes which savor of a lottery. The schemes forbidden by the statute are not limited to those which impoverish the participants, or even involve risk of pecuniary loss to them. *Horner* v. *United States,* 147 U. S. 449. The programs embraced by the Commission's rules are designed to "buy" an audience by the lure of a prize awarded by chance. The rules constitute a correct interpretation of 18 U. S. C. 1304, and should be sustained.

ARGUMENT

WHERE A PRIZE AWARDED IN WHOLE OR IN PART BY CHANCE IS NOT A GIFT, BUT IS GIVEN IN RETURN FOR REQUIRED ACTS WHICH ARE CALCULATED TO BE OF FINANCIAL GAIN TO THE PROMOTER, THERE IS A LOTTERY OR SIMILAR SCHEME WITHIN 18 U. S. C. 1304

INTRODUCTION

In their posture before the district court these cases raised a variety of broad issues relating to the power of the Federal Communications Commission to promulgate by rule a licensing policy based upon the interpretation of a criminal statute relating to broadcasting. Those broad issues have been resolved by the unanimous decision of the district court sustaining the Commission's

power, and the failure of appellees to take any appeal from that decision. Similarly, certain portions of the rules originally challenged (paragraph a, and paragraph b (1), *supra,* pp. 3-4) were sustained below, and are not now open to review in light of appellees' failure to appeal.

The issue before the Court is a narrow one. The Commission has concluded that, to the extent that prizes are distributed by chance, certain types of so-called radio give-away shows are essentially lotteries or similar schemes within the meaning of a specific criminal statute relating to the broadcast of lotteries. Accordingly, the Commission has defined the types of programs it believes to fall within the ban of the statute, and has announced that it will deny licenses to those who regularly broadcast such programs. The rules now at issue provide in substance that a give-away scheme in which one must listen to or view the program in order to win a prize distributed by chance is in violation of 18 U. S. C. 1304. By a divided vote, the court below has disagreed with the Commission's interpretation and set aside the rules in question. We propose to demonstrate by an analysis of the statute and its genesis, as well as the judicial decisions interpreting lottery law, that the result reached by the district court is not "consistent with law, or, indeed, with reason" (Clark, J., dissenting, R. 132).

Anti-lottery legislation may be characterized as moral legislation, designed to protect people from their own instincts of cupidity. Like all such legislation, it tends to be unpopular, and an agency which undertakes to enforce it invites the criticism that it is merely seeking to impose its own moral precepts. It must be pointed out, however, that this particular moral legislation relates specifically to broadcasting and that it is a clear-cut congressional declaration of public policy. The Commission cannot fail to give effect to that Congressional policy in carrying out its licensing functions.[14]

The Commission's study of give-away programs left it with the firm conviction that those programs are nothing but age old lotteries in a slightly new form. The new form results from the fact that the schemes here are illicit appendages to legitimate advertising. The classic lottery looked to advance cash payments by the participants as the source of profit; the radio give-away looks to the equally material benefits to stations and advertisers from an increased radio audience to be exposed to advertising.

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[14] Indeed, representatives of a large segment of the radio industry have recognized, and condemned, programs designed to "buy" the radio audience by requiring it to listen in the hope of a reward. "The Television Code" of the National Association of Radio and Television Broadcasters, effective March 1, 1952, states (p. 2) that "Any telecasting designed to 'buy' the television audience by requiring it to listen and/or view in hope of reward, rather than for the quality of the program, should be avoided."

Consideration in the form of payment of money or a thing of value is not a prerequisite of a lottery or similar scheme under the statute, or under the better reasoned cases. The essence of a lottery lies in the profit reaped by its promoter from the exploitation of the cupidity of the participants which leads the latter to take action beneficial to the promoter. The bait or lure is in the form of a prize to be distributed by chance to one lucky participant. Each hopeful participant acts in reliance upon the possibility—however slim it may be statistically—that he will hit the jackpot.

Thus the role of consideration is a limited one. It serves to distinguish the pure gift from the profit making scheme. Unless the promoter receives some benefit directly or indirectly from the participants, the scheme loses an essential flavor of exploitation and unjust enrichment. The rich man in the motion picture "If I Had a Million" (Paramount Publix Corporation, 1932) who gave away his millions to persons chosen at random was not conducting a lottery. Nothing was required of the beneficiaries of his whimsical generosity, and no benefits flowed to him. But in looking for some consideration in a scheme, we must not seek "a symbolic peppercorn" such as would "formalize a contract or a conveyance" (Clark, J., dissenting below, R. 135). The proper test as Judge Clark convincingly demonstrated, "is a practical one, *perceptive of the fact that the*

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yield to the operator is surely all important" [*ibid.*; emphasis supplied].

The schemes proscribed by the rules in issue fully meet this practical test. Subdivisions (2), (3) and (4) of paragraph (b) of the rules, which were set aside by the district court and are in issue upon this appeal, cover those schemes where in order to be eligible to win or compete for a prize:

> (2) such winner or winners are required to be listening to or viewing the program in question on a radio or television receiver; or
>
> (3) such winner or winners are required to answer correctly a question, the answer to which is given on a program broadcast over the station in question or where aid to answering the question correctly is given on a program broadcast over the station in question. For the purposes of this provision the broadcasting of the question to be answered over the radio station on a previous program will be considered as an aid in answering the question correctly; or
>
> (4) such winner or winners are required to answer the phone in a prescribed manner or with a prescribed phrase, or are required to write a letter in a prescribed manner or containing a prescribed phrase, if the prescribed manner of answering the phone or writing the letter or the prescribed phrase to be used over the phone or

in the letter (or an aid in ascertaining the prescribed phrase or the prescribed manner of answering the phone or writing the letter) is, or has been, broadcast over the station in question.

These subsections therefore delineate those schemes which directly or indirectly require the audience to listen to, or view, the program as a condition of being eligible to win a prize.[15]

[15] An example of a typical give-away is "Sing It Again." A script of this program is attached to the CBS amended complaint as Exhibit I (R. 256–274). The program is described in the CBS amended complaint as follows (R. 247):

"Performers sang a popular song and then repeated it but this time with parody lyrics describing some person, place, event, or the like. Contestants, selected at random from phone books, were called on the telephone during the program. The contestants paid nothing in order to compete. They were asked to identify the person, place or event described by the parody lyrics which they heard over the radio. If the contestant answered correctly, he won a prize and then had a chance to identify a secret voice. The secret voice sang giving clues as to his or her identity. Additional clues were also given on the program and on other programs. The person identifying the secret voice won a main prize. The main prize was increased week by week until the proper identification was made.

"If the contestant failed to identify the person referred to in the parody lyrics he was given a prize of lesser value (hereinafter referred to as a 'consolation prize'), and then another contestant in the studio, chosen by lot by the number on the stub of his admission ticket, was given the opportunity to answer and win a prize. He was awarded no prize if he answered incorrectly. The contestant in the studio had no opportunity to try for the mystery voice main prizes. The studio contestants were admitted to the studio without charge and paid nothing in order to compete."

CBS stated below (Br. 24) that this program came within

While the requirement that a participant listen to (or view) the program may be stated in terms, it may also be made a practical necessity by furnishing clues from program to program, playing a song over the air which must be identified, or otherwise inducing attention as provided for in subdivisions (3) and (4). The format of individual programs of course changes from time to time. But the end result is the same in any program covered by the rules. Those who hope to win give the program their close attention.

That the purpose of requiring attention to sponsored broadcasts as a requisite of eligibility for winning a prize is to increase sales and enable the station to sell time is obvious and apparently not disputed.[16] Commercial radio

subdivision (3), and also that "few contestants selected from the radio or television audience, i. e., non-studio contestants, unless they listened to or viewed the programs, would be in a position to answer correctly the questions asked of them."

A substantially similar program on television was the TV version of "Stop the Music". A transcription of a typical broadcast is in Exhibit K to the affidavit of G. B. Zorbaugh in support of ABC motion for summary judgment (R. 79–89).

[16] Judge Leibell stated for the majority below (R. 125), "We may assume that when a manufacturer becomes a sponsor for a radio or television program, the amount he will pay for it will depend upon its popular appeal, the size of the invisible audience it is likely to attract. The features of a program that have a special appeal may be many and varied. It would be a mistake to assume that everyone who listens to the program on the radio or views it on television, does so in the hope that he may receive a telephone call to act

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and television stations in the United States are sustained by the revenue received from sponsors who utilize the stations as advertising media. Radio advertising, like other advertising, must be communicated to be effective. It is axiomatic that the value of the advertising to the sponsor is directly related to the size and makeup of the audience reached by the advertisement. This Court has pointed out that a licensee of a commercial broadcast station will "survive or succumb according to his ability to make his programs attractive to the public." *Federal Communications Commission* v. *Sanders Radio Station,* 309 U. S. 470, 475.

The Commission's Report and Order adopting the rules accordingly stated (R. 168):

> We take official notice of the fact that one of the most important factors in securing sponsors for radio time is the number of people who probably or actually listen to the station's programs, as determined by listener surveys and other means. Therefore, especially when the listener has available a choice of services, the licensee seeks to attract the listener to create "circulation" as a basis for the sale of radio time, and the sponsor seeks to attract the listener so that the sponsor's

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as a participant and win a prize; but that many may harbor that hope is probably true, otherwise that feature of the program would not be included. If it adds to the value of the program for a sponsor, it has a money value to the broadcasting station."

> advertising message may be delivered and the listener induced to purchase the sponsor's product or services.

As will be shown in detail herein, the radio give-away programs have all the essential ingredients of a traditional lottery. Only the form of the scheme is somewhat different. The broad remedial purpose of the statute will not be served unless the courts are vigilant in striking down new guises of the old evil at which the statute is aimed. With respect to the very similar scheme known as Bank Night, the majority of courts were quick to stamp as a lottery a scheme which, despite a different appearance, had all the basic ingredients of a lottery. It is submitted that the same result should be reached here.

A. *The background and scope of 18 U. S. C. 1304*

Section 1304 of the Criminal Code does not represent a novel foray into the field of moral legislation. It is the latest enactment in a long series of Federal provisions designed to combat lotteries and similar schemes in areas subject to Federal authority. While this statute was aptly characterized by Judge Clark, dissenting below, as falling within the class of "attempts to enforce moral precepts which to a large part of the community seem strange and excessively puritanical" (R. 135), its history makes clear the consistent judgment of Congress over a period of many

years that lotteries and all similar schemes represent a serious evil. The widespread evils of lotteries and similar schemes in the past have led not only Congress, but the constitutional conventions and legislatures of the several States, to prohibit all such schemes in the most sweeping of terms.

The history of lotteries, both in England and this country, is one of an early tolerance being replaced by a steadily developing public policy against use of such devices for public or private purposes.[17] Lotteries were at one time utilized by government in both countries as a ready source of revenue for state and semi-public purposes. Apparently the first such use in England was as early as the reign of Queen Elizabeth. This first lottery was authorized in 1566 and actually drawn in 1569.[18] From that time until 1826 lotteries

[17] For the history of lotteries in England and the United States, see Ashton, *A History of English Lotteries* (1893); Thomas, *Law of Lotteries, Frauds and Obscenity in the Mails* (1903) pp. 1–9; Williams, *Flexible-Participation Lotteries* (1938), pp. 1–21; Spofford, *Lotteries in American History*, at p. 171 of American Historical Association Report for 1892; Final Report of Royal Commission on Lotteries and Betting (1933), Chapter I; Gaming and Wagering, Vol. 10 Encyclopaedia Britannica, p. 11.

[18] The lottery bill is quoted in full in Ashton, *A History of English Lotteries*, pp. 5–16. The price was "the summe of tenne shillings sterling onely, and no more", and in addition to numerous lesser prizes "whoever shall winne the greatest and most excellent price" [prize] was to receive five thousand pounds sterling in money and goods. The object was "the reparation of the havens and strength of the Realme, and

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were authorized by the King and later by Parliament, being used for special purposes and the general needs of the State.

Lotteries were also common in the American colonies and in the new States for years after the adoption of the Constitution, many being organized for public purposes. The beginning of the new world was aided in 1612 when a lottery was authorized to help in the establishment of the Virginia colony. In later years, lotteries were used for various purposes. The proprietors of Pennsylvania attempted to sell land by lottery, and a lottery was organized in 1748 in Philadelphia to erect a battery of cannon on the Delaware. Money raised by lotteries repaired the beach at Plymouth in 1812, rebuilt Faneuil Hall in Boston in 1764, and repaired the streets of Charlestown in 1779. Even the expenses of the revolution were in part defrayed by the proceeds of lotteries authorized by the Continental Congress.[19]

towardes such other publique good workes." The drawing was held at the west door of St. Paul's Cathedral in London.

[19] See Spofford, *Lotteries in American History*, pp. 173–195 of American Historical Association Report for 1892. An 1812 Act of Congress authorizing the City of Washington to provide for lotteries under specified conditions (that they be for public improvements, limited to $10,000 a year, and subject to Presidential approval) caused trouble when tickets were sold in Virginia where lotteries were illegal. This Court held in *Cohens* v. *Virginia*, 19 U. S. (6 Wheat.) 264 that the statute did not authorize the City of Washington to force the sale of tickets where they were prohibited by law, although legal at their origin.

In England, private lotteries were forbidden long before the government ceased to make use of them as a source of revenue. The last lottery authorized by Parliament was held in 1826. But the Unlawful Games Act (33 Hen. 8, c. 9) had prohibited certain games such as dice, cards, and even tennis, in 1541, and the first statute directed specifically at lotteries was 10 Will. 3, c. 23 in 1698. It declared them to be a common and public nuisance. It was followed by a number of additional statutes which culminated in the Betting and Lotteries Act of 1934 (24 and 25 Geo. 5 c. 58).[20] This act made all lotteries unlawful, with the exception of specified private lotteries conducted as an incident to bazaars, fetes, etc., and lotteries conducted by Art Unions.

The English statute is similar to the pattern of legislation adopted by Congress in that it contains no limiting definition and does not mention pecuniary consideration as a necessary element. For the detrimental social and economic effects of the lottery scheme in a developing society had long been recognized as broader than immediate impoverishment of the poor and credulous. The spectacle of gullible persons who can least afford it squandering their savings or small earnings on

[20] The 1934 statute followed the comprehensive Report of the Royal Commission on Lotteries and Betting (1933). The Statute Law Revision Act (14 Geo. 6 c. 6, 1950) repealed that part of the 1934 Act which listed the prior acts there repealed, with a provision that the prior repeal was not thereby affected.

lottery schemes was undoubtedly a prime factor in the first English anti-lottery legislation, as was the frequent concurrence of fraud. See preamble to 10 Will. 3, c. 23. But by 1808 a Select Committee strongly condemned even regulated State lotteries, stating:

> In truth, the foundation of the Lottery is so radically vicious, that your Committee feel convinced that, under no system of regulations which can be devised, will it be possible for Parliament to adopt it as an efficient source of Revenue, and at the same time divest it of all the Evils and Calamities of which it has hitherto proved so baneful a source. A spirit of adventure must be excited amongst the community, in order that Government may derive from it a pecuniary resource. That spirit is to be checked at a certain given point, in order that no Evils may attend it—the latter object has not hitherto been attained; with all the pains which have been bestowed upon it. Your Committee are of opinion that its attainment is impossible.[21]

In addition to the impoverishment often resulting from the improvidence of the poor, the Committee strongly condemned the lottery's effect upon character and the spirit of speculation it induced in a manufacturing and commercial nation.

[21] Extracts from the Second Report of the Select Committee on the Laws Relating to Lotteries (1808) reprinted as Appendix II to the Report of the Royal Commission on Lotteries and Betting (1933).

In 1933, the Royal Commission on Lotteries and Betting issued its Final Report surveying existing law and practice, and again advising against the lottery as a means of raising revenue. Its finding was that (p. 132) "The effects of large lotteries upon character are more subtle and harder to determine but may well be more important in the long run than the material results."

On this side of the Atlantic, as in England, private lotteries were frequently prohibited while the colonies, and later the States, themselves utilized lotteries for public purposes. This background of early public use probably accounts for the form taken by many State constitutions in which the legislature is specifically forbidden to authorize any lotteries.[22] Anti-lottery constitutional provisions and legislation were enacted

[22] As early as 1721 New York prohibited unlicensed lotteries. In 1821 it adopted a constitutional prohibition against all future lotteries, and authorized legislation against them, except for those already provided for by law. In 1833 all lotteries were made illegal. See *The People* v. *Sturdevant*, 23 Wend. 417 (N. Y. Sup. Ct.).

In Pennsylvania, a committee of the House of Representatives reported in 1832 that the only lottery authorized by the legislature then still in active operation was that of the Union Canal Company. It had been authorized to raise funds by means of a lottery as early as 1795. The Committee reported that the company had exhausted its privileges, and warned of the danger of trusting to any system of finance based upon so immoral a foundation. Report of the Committee of the House of Representatives of Pennsylvania on Lotteries (1832).

throughout the 19th Century, and the Louisiana lottery, the last authorized lottery, disappeared from the scene in 1893. Today 37 States have anti-lottery provisions in their constitutions, and all forty-eight States have enacted anti-lottery legislation.[23] The constantly increasing pressure against lotteries in the various states was made fully effective by concurrent Federal legislation, and the present statute prohibiting the use of radio for the promotion of lotteries is a direct outgrowth of the earlier laws keeping the mails from being made an instrument of lottery schemes.

Congress first took action against lotteries in 1827 by prohibiting postmasters from acting as agents for lottery offices and from receiving "lottery schemes, circulars or tickets" free of postage (4 Stat. 238, Sec. 6). In 1868 it was made unlawful to send by mail "any letters or circulars concerning lotteries, so-called gift concerts or similar enterprises offering prizes of any kind on any pretext whatever." (Act of July 27, 1868, section 13, 15 Stat. 194, 196).[24] This Act was followed four years later by an act prohibiting the mailing of letters or circulars concerning *illegal* "lotteries, so-called gift-concerts, or other

[23] See Appendix A, *infra*, p. 66.

[24] An amendment authorizing postmasters to withhold the delivery of suspected letters was stricken out in conference. 82 Congressional Globe, July 24, 1868, p. 4412.

similar enterprises offering prizes * * *." (Section 149 of the Act of June 8, 1872, 17 Stat. 283, 302).[25] The word "illegal" was soon stricken out (Section 2 of the Act of July 12, 1876, 19 Stat. 90).

The next revision of the postal laws came in the Act of September 19, 1890 (26 Stat. 465), when the existing law was further tightened. The law was amended to include newspapers containing "any advertisement of any lottery or gift enterprise of any kind offering prizes dependent upon lot or chance" (Section 1), and the general language prohibiting use of the mails was changed to refer to "any lottery, so-called gift concert, or other similar enterprise offering prizes dependent upon lot or chance" (Section 1). The Postmaster-General was also authorized, upon evidence satisfactory to him, to return registered letters and forbid the payment of postal money orders when satisfied that there was involved "any lottery, gift enterprise or scheme for the distribution of money, or of any real or personal property by lot, chance, or drawing of any kind * * *" (Sections 2, 3).

By the Act of March 2, 1895 (28 Stat. 963) the previous authorization with respect to registered letters was extended to all letters (Section

[25] Section 300 also authorized the issuance by the Postmaster General of fraud orders against fraudulent lotteries. This language was not changed in 1876 when "illegal" was stricken out.

4), and it was made a crime to bring into the United States any advertisement of, or paper representing an interest in or dependent upon the event of, "a lottery, so-called gift concert, or similar enterprise, offering prizes dependent upon lot or chance * * *" (Section 1).

When the penal laws were codified and revised in the Act of March 4, 1909, the lottery laws were further strengthened by the addition of the words dependent "in whole or in part" upon lot or chance (Sections 213, 214, 237, 35 Stat. 1129, 1130, 1136). This act was described as bringing within its operation "all schemes savoring of a lottery". S. Rep. 10, Part 1, on S. 2982, 60th Cong., 1st Sess., p. 22. The final step was the enactment of Section 316 of the Communications Act of 1934, which is now 18 U. S. C. 1304 (see p. 9, *supra*). This section contains the same language as the 1909 enactment, and its purpose must be assumed to have been equally broad.

Today Federal law prohibits lotteries in Alaska (48 U. S. C. 77) and Hawaii (48 U. S. C. 562). It also contains both criminal and civil provisions prohibiting the use of the mails for lottery schemes (18 U. S. C. 1302, 1303, formerly 18 U. S. C., 1940 ed. 336, 337; 39 U. S. C. 732 (formerly R. S. 4041), 259 (formerly R. S. 3929)), and forbids the importation into the United States or the carriage in interstate commerce of lottery materials (18 U. S. C. 1301, formerly 18 U. S. C.,

1940 ed. 387).[26] And the statute in the case at bar brings the new medium of radio within the framework of the prohibitions against any form of lottery scheme (18 U. S. C. 1304, formerly 47 U. S. C. 316). Indeed, the only exemption provided by Federal law is for fishing contests *not conducted for profit* (18 U. S. C. 1305).

Although the first enactment in 1827 was limited to "lottery schemes, circulars or tickets," the phraseology of the Federal statutes was broadened in 1868 and has remained in essentially the same form to this date. And the courts of this country have recognized in lottery schemes the same broad and pervading evils found by the English. Strikingly similar to the statement of the British Select Committee in 1808 is the language of this Court in *Stone* v. *Mississippi,* 101 U. S. 814, 821:

> Society built on such a foundation would almost of necessity bring forth a population of speculators and gamblers, living on the expectation of what, "by the casting of lots, or by lot, chance, or otherwise," might be "awarded" to them from the accumulations of others.

Lotteries are generally designed to profit their promotors, but it is an unrealistic notion that they must also be designed to bankrupt the par-

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[26] 19 U. S. C. 1305 (a) also provides that lottery tickets and advertisements of lotteries shall not be admitted into the United States.

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ticipants. It was argued below (CBS Br. 41) that the evil at which Section 1304 and similar statutes are directed is solely the tendency of lotteries to impoverish and pauperize the public. And the majority of the district court apparently adopted its test of a "price" in large part upon the ground that this test was the only one consistent with the risk of pecuniary loss. It sought, in effect, a specific form of gambling (R. 128). However, the deleterious effects of lotteries are not always so direct as immediate impoverishment nor need the scheme itself take the form of a wager. The courts have consistently held to be lotteries schemes where risk of loss in a direct gambling sense was in no way involved and where impoverishment could not possibly have been thought the primary evil.

The decision by this Court in the leading case of *Horner* v. *United States,* 147 U. S. 449, makes very clear that pauperism is not the only evil of lotteries. In the *Horner* case the year of redemption of bonds sold by the Austrian Government was determined by a series of drawings. Other large additional amounts to be paid on certain of the bonds were also determined by the drawings. All of the bonds were to be redeemed and there was no question of their being worth less than the price paid.

It was urged upon this Court that the money received from the bonds was not to be used to

repay them or to pay the prizes, and that as the primary object was a loan, the issuance of the bonds was not transformed into a lottery because of the subsidiary features which were like a lottery. It was also apparently urged that as there was no question of financial loss, there could be no lottery. Both arguments were rejected. The Court stated that it was "quite evident that she [Austria] undertook to assist her credit by an appeal to the cupidity of those who had money" (147 U. S. at 459), and held the scheme to be a "lottery or similar scheme". In citing with approval the Maryland case of *Ballock* v. *State*, 73 Md. 1 (dealing with the same bonds), this Court also approved the rejection in that case of the specious argument that "because the money ventured must all come back, with interest, so that there could be no final loss, it could not be a lottery" (147 U. S. at 462).

If the risk of loss were the sole evil of lotteries, the *Horner* case would have been decided otherwise. There was no impoverishment and no exploitation of the poor. But this Court expressly recognized that the broader evil sought to be eradicated is the promotion of a "gambling spirit and a love of making gain through the chance of dice, cards, wheel or other method of settling a contingency" (147 U. S. at 462).[27] Thus, as Judge Clark pointed out below (R. 133–4):

[27] It has been pointedly observed of the *Horner* case by a former Assistant Attorney General for the Post Office De-

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Now the essential purpose cannot be oversimplified to debauchery by a single giant lottery, or even several lotteries, as the initial and leading case of *Horner* v. *United States,* 147 U. S. 449, is at pains to point out. Rather it is aimed at a somewhat less direct road to waste and want: the lack of industry and initiative induced by initial success in getting valuable returns from the operation of chance. There is also quite specifically the unjust enrichment which accrues to the manipulators of the scheme.[28]

partment in an authoritative text: "Who was *wronged in the Horner case?* Did not every investor get back his money with interest, and was there in a single instance final loss to anyone? No. Those who drew prizes were simply benefited above their fellows. But somebody was wronged in the *Horner* case * * *. The Supreme Court of the United States assumed that some bought Austrian bonds *because prizes were offered, who would not otherwise have invested,* and in such case such party was wronged, not because he would lose anything by the transaction, but because he was by improper means induced to buy something that he would not have bought in the absence of such means." Thomas, *Lotteries, Frauds and Obscenity in the Mails* (1903), 32.

[28] As was said in *State* v. *Dorau,* 124 Conn. 160, 163, 198 A. 573, 574, "The evil of gambling and like practices is not by any means confined to the impoverishment and squandering of the money which directly results from the making of a wager."

For further recognition and condemnation of the broad evils of lottery schemes, see *Central States Theatre Corp.* v. *Patz,* 11 F. Supp. 566 (S. D. Iowa); *Furst* v. *A. & G. Amusement Co.,* 128 N. J. L. 311, 25 A. 2d 892; *State* v. *McEwan,* 343 Mo. 213, 120 S. W. 2d 1098; *State ex rel. Hunter* v. *Fox Beatrice Theatre Corp.,* 133 Neb. 392, 275 N. W. 605, 607; *State ex. Inf. McKittrick* v. *Globe-Democrat Publishing Co.,* 110 S. W. 2d 705 (Mo.); *Troy Amusement Co.* v. *Attenweiler,*

The many cases involving various types of gift enterprises also show clearly that the evil at which the statute is aimed is not limited to impoverishment. While the lottery has maintained its traditional elements, and could not change them without loss of both appeal and profit, it has not been limited to its traditional form. The gift enterprise is perhaps the most common example of the attempt to engraft illegal lottery techniques and principles upon otherwise legal sales of goods. With the purchase of an article goes the chance to win a prize. It is simple, effective and illegal.

That the term "gift enterprise" is sufficiently definite and embraces a class of transactions which may validly be condemned was settled in *Matter of Gregory,* 219 U. S. 210. And it has been uniformly held that where purchase of an article entitles the purchaser to a chance at a prize, a lottery by way of gift enterprise exists even where the article alone may be well worth its price. *Horner* v. *United States, supra; Bell* v. *The State,* 37 Tenn. (5 Sneed) 507; *United States* v. *One Box of Tobacco,* 190 Fed. 731 (C. C. A. 4); *Rountree* v. *Ingle,* 94 S. C. 231, 77 S. E. 931; *Whitley* v. *McConnell,* 133 Ga. 738,

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64 Ohio App. 105, 28 N. E. 2d 207, *aff'd.* 137 Ohio St. 460, 30 N. E. 2d 799; *Seidenbender* v. *Charles,* 4 Sergeant & Rawle 151, 8 Am. Dec. 682; *Thomas* v. *The People,* 59 Ill. 160. "If you cheat people, you affect their pocketbook; if you encourage them to gamble, you affect their character." *Minter* v. *Federal Trade Commission,* 102 F. 2d 69, 71 (C. A. 3).

66 S. E. 933; *Standridge* v. *Williford-Burns-Rice Co.,* 148 Ga. 283, 96 S. E. 498; *Utz* v. *Wolf,* 72 Ind. A. 572, 126 N. E. 327; *Corporate Organization & Audit Co.* v. *Hodges,* 47 App. D. C. 460[29] (a more complicated scheme in which merchants advertising in a newspaper received votes, which in turn were given to their customers. The newspaper gave the prize based upon the highest number of votes.); *Market Plumbing & Heating Supply Co.* v. *Spangenberger,* 112 N. J. L. 46, 169 A. 660, affd., 114 N. J. L. 271, 176 A. 342; *Worden* v. *City of Louisville,* 279 Ky. 712, 131 S. W. 2d 923; *Try-Me Bottling Co.* v. *State,* 235 Ala. 207, 178 So. 231.

As the court stated in *Whitley* v. *McConnell,* 133 Ga. at 740, 66 S. E. at 933,

> Enticing offers of this kind are unfortunately not uncommon in the effort to attract trade or make sales. But they are illegal. That a lottery or gift enterprise scheme is added to legitimate business to draw customers or buyers by appealing to the hope of securing something by chance, beyond the article actually bought, does not sanctify such an appeal to the gambling disposition so common in human nature, or make the agreement lawful.

The decisions in England are in accord: *Taylor* v. *Smetten* (1883) 11 Q. B. 207; *Hall* v. *McWil-*

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[29] Cf., *Jolovitz* v. *Redington & Co.*, 88 A. 2d 589 (Me.); but see *Leonard* v. *Pennypacker*, 85 N. J. L. 333, 89 A. 26 finding chance lacking in a similar scheme.

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liam (1901) 85 L. T. 239; *Hunt* v. *Williams* (1888) 52 J. P. 821; *Bartlett* v. *Parker* (1912) 2 K. B. 497.[30]

Similar schemes which were variations of the gift enterprise have also consistently been found to fall within the ban of the law. Thus, in one case tickets given at a performance entitled a lucky holder to a present if the entrepreneur liked him and decided to give it to him. *State* v. *Shorts and Tilney,* 32 N. J. L. 398, 90 Am. Dec. 668. In *Dunn* v. *The People,* 40 Ill. 465, an envelope purchased for 25¢ contained a card listing merchandise which could then be bought for $1. In *Thomas* v. *The People,* 59 Ill. 160, $5 entitled one to an engraving and to tickets to lectures and concerts at which prizes were given. Newspaper subscribers were entitled to participate in the distribution of prizes by lot in *The State* v. *Mumford,* 73 Mo. 647. And in *Waite* v. *Press Publishing Ass'n.,* 155 Fed. 58 (C. C. A. 6), subscribers to a publication were entitled

[30] The law of England has been summarized in Halsbury's *Laws of England* (2d Ed.) Vol. 15, p. 526 as follows: "a scheme whereby cash or other gifts are offered to purchasers of commodities may be a lottery, notwithstanding that the commodities are in fact worth the money paid for them. In such a case nothing is added to the price of the article for the chance. But the chance, by offering an inducement to others to purchase, so increases the sale of the article that it becomes possible to provide the prizes out of the profits. It is only in this indirect way that the purchasers contribute to the prizes; but this contribution is sufficient to make the scheme a lottery."

to guess at the number of votes cast in a forthcoming Presidential election. In each case, the court followed a realistic approach. In each case the scheme was found to be a lottery.

The rulings of a great majority of the State courts facing the problem that Bank Night was illegal [31] would similarly be unsound if the reasoning of the majority of the district court were valid. Bank Night appeared during the 1930's when motion picture receipts evidently needed a strong stimulant. It illustrates quite clearly a major attempt to mask the essential purposes of a lottery while retaining the full benefits of it for the promoter. While one version of Bank Night in which prizes given by lot were available only to paying patrons was obviously foredoomed to failure under the lottery laws, see *Sproat-Temple Theatre Corp.* v. *Colonial Theatrical Enterprise, Inc.,* 276 Mich. 127, 267 N. W. 602, the scheme commonly took a less obvious form.

In the scheme generally employed, registration by the public at the theatre was free. Prizes could be won by patrons and non-patrons alike. The winners were announced both inside and outside the theatre, and it was merely necessary to appear at the theatre within a few minutes to claim the prize. Thus, no one who wanted to win a Bank Night prize had to pay anything for his chance.

[31] See Appendix B, p. 72. The approach to Bank Night taken by different courts will be discussed more fully in Part B, *infra.*

Anyone could receive his chance without payment of a "price" or "thing of value." And those who did pay the admission fee of course saw the picture. But a large majority of the courts found the scheme illegal.[32]

There is, therefore, no necessity for any "gamble" or risk of pecuniary loss in a gambling sense. An ordinary purchase may be involved. It may be one which would have been made in any event. But it may not be stimulated by the lure of a chance to win a prize. A gambling spirit, with its attendant evils, is aroused by the chance to "make a killing." The effects are multiplied when the prizes are so large as fairly to stagger the imagination and when the chance at them may come to any home. As Judge Clark stated (R. 133–4), the essential purpose of the law cannot be oversimplified to impoverishment.

It is significant in this connection that this Court has upheld the authority of the Federal

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[32] See e. g., *Grimes* v. *State*, 235 Ala. 192, 178 So. 73; *State* v. *McEwan*, 343 Mo. 213, 120 S. W. 2d 1098; *Troy Amusement Co.* v. *Attenweiler*, 64 Ohio App. 105, 119–122, 28 N. E. 2d 207, 212–213, affd., 137 Ohio St. 460, 30 N. E. 2d 799; *Central States Theatre Corp.* v. *Pätz*, 11 F. Supp. 566 (S. D. Iowa); *State ex rel. Hunter* v. *Fox Beatrice Theatre Corp.*, 133 Neb. 392, 275 N. W. 605; *State ex rel. Draper* v. *Lynch*, 192 Okla. 497, 137 P. 2d 949; *State ex rel. Hunter* v. *Omaha Motion Picture Exhibitors Assn.*, 139 Neb. 312, 297 N. W. 547; *Iris Amusement Corp.* v. *Kelly*, 366 Ill. 256, 8 N. E. 2d 648; *Barker* v. *State*, 56 Ga. App. 705, 193 S. E. 605, *State* v. *Greater Huntington Theatre Corp.*, 133 W. Va. 252, 55 S. E. 2d 681; *Commonwealth* v. *Lund*, 142 Pa. Super. 208, 15 A. 2d 839, allocatur refused 142 Pa. Super. xxxi.

Trade Commission to prevent as unfair competition the use of the lure of chance to win prizes, even where the participants used only pennies. *Federal Trade Commission* v. *Keppel & Bro.*, 291 U. S. 304. The scheme involved there was the sale of penny candies. Some, selling for 1 cent each, had a penny concealed in the wrapper; others had the retail price of 1, 2 or 3 cents marked on a piece of paper concealed in the wrapper; and others had colored centers entitling the purchaser to a prize. The Commission found the use of this selling device to be a lottery. The Court, in an opinion by Mr. Justice Stone, agreed that it was an unfair trade practice and further stated:

> Without inquiring whether, as respondent contends, the criminal statutes imposing penalties on gambling, lotteries and the like, fail to reach this particular practice in most or any of the states, it is clear that the practice is of the sort which the common law and criminal statutes have long deemed contrary to public policy (291 U. S. at 313).[33]

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[33] The attempt to distinguish the scheme in the *Keppel* case as one involving children, to whom loss of a small sum is of some consequence, has been specifically rejected. *Hofeller* v. *Federal Trade Commission*, 82 F. 2d 647 (C. A. 7), cert. den., 299 U. S. 557. And see *Modernistic Candies* v. *Federal Trade Commission*, 145 F. 2d 454 (C. A. 7). The Court there condemned the use of lotteries in merchandising because of the improper appeal to the desire to "get something for nothing." See also *Consolidated Mfg. Co.* v. *Federal Trade*

Congress has not made likelihood of impoverishment or pecuniary loss a test for the existence of a lottery or similar scheme. It would have been a difficult standard to define, and difficult to administer. Any attempt to import such a standard judicially would lead to the same difficulty. This is well illustrated by the opinions below. The majority below, which was impressed by the impoverishment concept (R. 128), nevertheless apparently recognized that a one cent payment for a chance is enough. If the test were really impoverishment, however, would not a quantitative minimum have to be placed upon the "price" for a chance? Would this standard be applied differently to rich and poor? Surely, no impoverishment standard could realistically be formulated in disregard of these problems. Similarly a pecuniary loss standard would require weighing of imponderables in each individual case. Perhaps in recognition of such difficulties in drawing a line, Congress has outlawed *all* lotteries and similar schemes conducted by mail or radio. This Court's

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Commission, 199 F. 2d 417 (C. A. 4); *Sweets Co. of America* v. *Federal Trade Commission*, 109 F. 2d 296 (C. A. 2).

The additional argument made in the district court (CBS Br. pp. 38–43) that the power of Congress to regulate interstate commerce is limited to preventing schemes which lead to pauperism is thus merely an attempt to narrow well recognized boundaries of Congressional power, and to disregard the leading precedents in the lottery field. See also *Matter of Gregory*, 219 U. S. 210; *Rast* v. *Van Deman & Lewis*, 240 U. S. 342.

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decision in the *Horner* case and the many State authorities in accord with it, have wisely refused to make pecuniary loss the litmus test of a lottery or similar scheme.

B. *The ingredient of consideration in the schemes outlawed under the Commission's rules*

As has been pointed out, *supra*, consideration has never been an express requisite of a lottery or similar scheme under federal legislation. And no mention of the term is found in 18 U. S. C. 1304, the statute here involved. It is true that courts have traditionally looked for some form of consideration as a method of distinguishing a lottery from a purely eleemosynary project involving distribution of gifts by chance. But except where statutes have in terms required *valuable* consideration, the better reasoned cases have realistically declined to require that there be some formal money payment by the participants in a scheme in order to stamp it a lottery. Where a scheme of chance is successfully designed to reap profits for its promoter, there will ultimately be consideration flowing from the participants, and it is of no consequence whether such consideration be direct or indirect. In either event, the gambling spirit—the lure of obtaining something for nothing or almost nothing—is exploited for the benefit of the promoter of the scheme.

The application of the principle that consideration for a lottery may be indirect is strikingly exhibited in the Bank Night cases. For in Bank Night (described *supra*, p. 43) as in the "give-aways" no one is required to pay anything or buy anything. Both schemes rely upon indirection, and as to both it may be argued that from the standpoint of an individual participant, no consideration is furnished. But in each, the participants as a group pay for the prizes "given" away, and more besides. That a profit will result can never be assured in advance, but promoters of lotteries take a calculated risk as to future profit before they commit themselves to "give" the prizes.[34] Their purpose is not altruistic. And whether the ultimate source of profit be the tendency of persons enticed to the door of a theater to pay the price to enter it, or the tendency of persons enticed to listen to advertising to purchase the product advertised, the gain to the promoter of the scheme is directly traceable to the lure of the lottery.

Bank Night, however successful in the theatre, failed in court because it was apparent upon sound analysis that it was designed solely to increase patronage by the customary lottery bait. The attempt to divorce the offer of prizes by

[34] That this calculated risk is reasonably taken with the "give-aways" is shown by their great financial value. (See CBS brief below, p. 4; ABC Amended Complaint Par. 11, 15 (R. 5, 6)).

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chance from the increase in gross receipts has been aptly characterized as "an attempt to sever cause from effect, to separate advertising from its results." *State* v. *Jones,* 44 N. M. 623, 627, 107 P. 2d 324, 326 (quoting Williams, *Flexible Participation Lotteries*).[35] The majority of courts have steadfastly refused to blind themselves to the causal relationship between the Bank Night scheme and increased theatre profits.[36] Typical of such decisions is that of the Court of Errors and Appeals of New Jersey in *Furst* v. *A. & G. Amusement Co.,* 128 N. J. L. 311, 313, 25 A. 2d 892, 893, which flatly rejected the contention that a pecuniary consideration must be paid for the chance to win a prize, and which ruled the scheme an illegal lottery whose object was to "stimulate the patronage of [the] theatre by catering to the natural gambling instinct of humanity in general." The court said:

> If the distribution of "prizes" were a pure gift, we could agree that the proceed-

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[35] This decision expressly overruled *City of Roswell* v. *Jones*, 41 N. M. 258, 67 P. 2d 286, which had sustained the legality of Bank Night.

[36] *E. g.*, *Kessler* v. *Schreiber*, 39 F. Supp. 655 (S. D. N. Y.); *Affiliated Enterprises* v. *Waller*, 40 Del. 28, 5 A. 2d 257; *Furst* v. *A. & G. Amusement Co.*, 128 N. J. L. 311, 25A. 2d 892; *Affiliated Enterprises, Inc.* v. *Gantz*, 86 F. 2d 597, 599 (C. A. 10); *State* v. *Wilson*, 109 Vt. 349, 359, 196 A. 757, 760; *State ex rel. Beck* v. *Fox Kansas Theatre Co.*, 144 Kan. 687, 62 P. 2d 929; *Troy Amusement Co.* v. *Attenweiler*, 64 Ohio App. 105, 28 N. E. 2d 207; *State* v. *McEwan*, 343 Mo. 213, 120 S. W. 2d 1098; *State ex rel. Hunter* v. *Fox Beatrice Theatre Corp.*, 133 Neb. 392, 275 N. W. 605. For a tabulation of Bank Night cases, see Appendix B, p. 72.

> ing did not constitute a lottery in the sense intended by the constitution and statute. * * * In the class of cases similar to that now before us—and there are a large number in the reports—an avowed object, and the inducement to a theatre proprietor to sign one of these contracts, is to stimulate the patronage of his theatre by catering to the natural gambling instinct of humanity in general. Those that pay to attend the performance may well be induced to do so when registering their names, by the prospect of hearing their names called and responding promptly. Those that have not paid for admission to the motion picture must at some inconvenience wait outside to be sure of hearing the announcement and of entering the theatre promptly thereafter. We have no hesitation in holding that the procedure was an unlawful "lottery" in the constitutional and statutory sense.

The same analysis is applicable to the case at bar, as Judge Clark's dissenting opinion below makes clear. Prizes on radio give-away programs are not pure gifts. Not only is time and effort expended in listening to the programs, but it would be highly artificial to ignore the effect of the increased radio audience procured by the scheme on the revenues of the station and the advertiser who is enabled to reach the increased audience.

The search for an ultimate financial benefit to the promoter secured from the participants by the enticement of a prize dependent upon chance has been the keynote of many other decisions involving different schemes. As was said in *Brooklyn Daily Eagle* v. *Voorhies,* 181 Fed. 579, 581 (C. C. E. D. N. Y.), a suit to restrain the Postmaster from refusing to accept a newspaper as second class mail:

> *The question of consideration does not mean that pay shall be directly given for the right to compete.* It is only necessary that the person entering the competition shall do something or give up some right. The acquisition and sending in of labels is sufficient to comply with that requirement. Nor does the benefit to the person offering the prize need to be directly dependent upon the furnishing of a consideration. Advertising and the sales resulting thereby, based upon a desire to get something for nothing, are amply sufficient as a motive. [Emphasis added.]

Three cases closely similar to the case at bar are *State ex rel. Regez* v. *Blumer,* 236 Wis. 129, 294 N. W. 491; *Knox Industries Corp.* v. *State ex rel. Scanland,* 258 P. 2d 910 (Okla.); and *Maughs* v. *Porter,* 157 Va. 415, 161 S. E. 242. In the *Regez* case, a drug store registered people throughout the city for a drawing. No fee or purchase was required, but it was necessary to pick up a free coupon at the store before each

day's drawing. In the *Knox* case, decided in 1953, an automobile was to be given away every 52 days among those holding tickets given free at defendant's service stations and stores. No purchase was required. In the *Maughs* case, people attending an auction were eligible for the prize without bidding or buying. In each of these cases, there was no "price" and no "thing of value" given as consideration for the chance. In each, as in Bank Night and the "give-aways", there was the same reliance upon an indirect consideration taking the scheme out of the realm of altruism and stamping it a lottery.[37]

[37] As the court said in the *Maughs* case (157 Va. at 420, 161 S. E. 244):

"The object of the defendant unquestionably was to attract persons to the auction sale with the hope of deriving benefit from the crowd so augmented. Even though persons attracted by the advertisement of the free automobile might attend only because hoping to draw the automobile, and with the determination not to bid for any of the lots, some of these even might nevertheless be induced to bid after reaching the place of sale. So we conclude that the attendance of the plaintiff at the sale was a sufficient consideration for the promise to give an automobile, which could be enforced if otherwise legal."

See also *Blair* v. *Lowham*, 73 Utah 599, 276 P. 292, where eligibility for a prize given at a resort was a ticket of admission, a railroad ticket on a line serving the resort, or a ticket to an adjoining race track; *Glover* v. *Malloska*, 238 Mich. 216, 213 N. W. 107, in which a fuel company sold tickets at 10¢ each to dealers who gave them away to customers and others (contempt found for evasion of decree, 242 Mich. 34); *State* v. *Bader*, 24 O. N. P. (N. S.) 186, *affirmed*, 21 Ohio L. R. 293, in which a cafeteria gave chances free to patrons and non-patrons alike.

Markedly similar also to the case at bar is the English case of *Willis* v. *Young* (1907) 1 K. B. 448. In that case, a newspaper had distributed medals gratuitously among members of the public. Each medal bore a number and the words, "Keep this, it may be worth 100£. See the Weekly Telegraph today." The winning numbers were published in the paper and this information could also be obtained at the newspaper office. It was not necessary to buy a paper. The court found the scheme to be a lottery although no price was charged for the medals, Lord Alverstone stating (1 K. B. at 454):

> If we look merely at the position of the holder of one of these medals, it is perfectly true that he may not have bought a copy of the newspaper; he may only know by oral information that he has won a prize. But the fact remains * * * that the scheme was devised by the proprietors to induce persons to inspect the paper * * * The case goes on to say that the proprietors' hope and intention in distributing the medals was that the recipients might be induced to purchase copies of the paper; that the scheme had been successful; that the objects the proprietors had in view had been attained in a steadily increasing manner; and that the circulation of the paper had increased by about 20 per cent. during the progress of the scheme.

It is submitted that the opinion of Judge Clark and the other authorities discussed above reflect

the correct view with respect to the role of consideration in lotteries. We recognize that the mechanical and rigid test of a money payment by the participant has been applied by courts other than the court below. But we believe that an examination of the cases applying such a standard demonstrates that they have done so quite uncritically, or as a result of the compulsion of statutes in terms requiring a valuable consideration.

The *only* decision of a Federal court relied on by the majority below for the principle that a "price" must be paid is *Garden City Chamber of Commerce* v. *Wagner,* 100 F. Supp. 769 (E. D. N. Y.). There, a district court, in construing a Postal Bulletin requiring "an expenditure of substantial effort or time," found that looking into store windows to find a number entitling the window-shopper to a prize was not consideration. This decision is not only in conflict with what we believe to be the sounder view, but adopted a principle not advocated by the majority below or any of the appellees, *i. e.,* that lottery consideration consists of a "contribution in kind to the fund or property to be distributed." The case was never considered on the merits by the Court of Appeals.[38] Of the other

[38] A stay pending appeal was denied by the court of appeals after a brief hearing on the motions calendar, Judge Clark dissenting (192 F. 2d 240 (C. A. 2)), and the appeal was subsequently not pursued. See 104 F. Supp. 235.

nine decisions relied upon by the majority below, five[39] involved state statutes in terms requiring a valuable consideration or monetary payment.[40] And in one of them, *State of Kansas ex rel. Beck* v. *Fox Kansas Theatre Co.,* 144 Kan. 687, 62 P. 2d 929, the court emphasized the particular language of the statute involved.

The other four cases relied upon below are *Griffith Amusement Co.* v. *Morgan,* 98 S. W. 2d 844 (Texas Civ. App.); *Darlington Theatres* v. *Coker,* 190 S. C. 282, 2 S. E. 2d 782; *State* v. *Big Chief Corp.,* 64 R. I. 448, 13 A. 2d 236; and *Commonwealth* v. *Wall,* 295 Mass. 70, 3 N. E. 2d 28. In one of these, *State* v. *Big Chief Corp., supra,* the court ruled that it need not decide the crucial question because there was no evidence that people had been brought to make purchases by their desire to participate in the drawing. The three remaining cases are part of a tightly inbred line which stems from *Yellow-Stone Kit* v. *State,* 88 Ala. 196, 7 So. 338. This case, decided in 1890,

[39] *People* v. *Shafer*, 160 Misc. 174, 289 N. Y. S. 649, aff'd. 273 N. Y. 475, 6 N. E. 2d 410; *People* v. *Burns*, 304 N. Y. 380, 107 N. E. 2d 498; *State ex rel. Stafford* v. *Fox-Great Falls Theatre Corp.*, 114 Mont. 52, 132 P. 2d 689; *People* v. *Cardas*, 137 Cal. App. 788, 28 P. 2d 99; *State of Kansas ex rel. Beck* v. *Fox Kansas Theatre Co.*, 144 Kan. 687, 62 P. 2d 929).

[40] But see *People* v. *Miller*, 271 N. Y. 44, 2 N. E. 2d 38, sustaining a Bank Night lottery conviction on the ground that the trial court had rejected the credibility of evidence of free participation, and confirming that there is a lottery even if the consideration is only 1 cent.

was apparently the first in which it was held that a valuable consideration is indispensable.

In the *Yellow-Stone Kit* case, the defendant, who gave performances consisting of music, dancing, acrobatics and exhibitions of a magic lantern, at which he sold medicines, was indicted for conducting a lottery. At the closing performance, conducted in a tent accommodating about 2,500 persons, with seats for about 1,000, prizes were distributed by lot. The admission fee was 10¢. Tickets for the chances had been distributed at previous performances (where the only fee was for a seat) and the doors were thrown open for free admission at the time of the drawing. It was not necessary to be present to win one of the prizes. The court held that "The suspicion, even though well founded, that these presents may have been given away in order to induce a large crowd to assemble at the defendant's performances, with the expectation that they would buy medicines, or pay a fee for occupying a seat in the tent, would be too remote to constitute a legal consideration for the tickets" (88 Ala. 201, 7 So. 339).

For its requirement of a valuable consideration the court relied upon a number of earlier cases mentioning valuable consideration, though not holding it to be a *sine qua non.* See, e. g. *Governors* v. *Art Union,* 7 N. Y. 228 (under a N. Y. statute requiring a valuable consideration); *State* v. *Clarke,* 33 N. H. 329, 66 Am. Dec. 723; *Bell* v.

State, 37 Tenn. (5 Sneed) 507; *Buckalew* v. *The State,* 62 Ala. 334. It stated that a gratuitous distribution not designed to evade the law was proper, and reasoned further from the propriety of determining rights by lot,[41] arguing that these were not the evils against which the law was directed. The court conceded that (88 Ala. at 200, 7 So. at 339):

> * * * the courts have shown a general disposition to bring within the term "lottery" every species of gaming, involving a distribution of prizes by lot or chance, and which comes within the mischief to be remedied, * * *

but refused to follow its own recognition of this principle, because of the absence of a valuable consideration.

The minority Bank Night cases and others which insist upon a valuable consideration stem directly from *Yellow-Stone Kit* v. *State.* In addition to those cited by the majority below, might be added: *Albert Lea Amusement Co.* v. *Hanson* 231 Minn. 401, 43 N. W. 2d 249; *State* v. *Hundling,* 220 Iowa 1369, 264 N. W. 608 (of which the Supreme Court of Iowa recently said, "we are not prepared to say we would affirm the *Hundling* case," *State* v. *Mabrey,* 56 N. W. 2d 888, 892); *State* v.

[41] Thus the court mentioned that under the law of the State a tie vote would result in choosing State officers by lot. This of course bears no resemblance to profiting from the cupidity of others.

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Eames, 87 N. H. 477, 183 A. 590 (under a statute requiring payment); *Cross* v. *The People*, 18 Colo. 321; *Affiliated Enterprises, Inc.* v. *Gruber*, 86 F, 2d 958 (C. A. 1); *Chancy Park Land Co.* v. *Hart*, 104 Iowa 592, 73 N. W. 1059; *Affiliated Enterprises, Inc.* v. *Rock-Ola Mfg. Corp.*, 23 F. Supp. 3 (N. D. Ill.).[42] In *State* v. *Eames*, 87 N. H. 477,

[42] The cross-citations in these cases leading back to *Yellow-Stone Kit* v. *State*, are of interest. The *Chancy Park*, *Hundling*, *Griffith Amusement Co.*, *Cross*, *Wall*, and *Eames* cases all cite *Yellow-Stone Kit*. *People* v. *Cardas* cites *Cross* v. *The People*. The *Gruber* case follows the *Eames*, *Wall* and *Hundling* cases. The *Hundling* case cites, in addition to *Yellow-Stone Kit*, *Cross* and *Cardas*. The *Eames* case cites, in addition to *Yellow-Stone Kit*, *Cardas* and *Cross*. *Chancy Park* also cites *Cross* v. *The People*. The *Rock-Ola* case follows *Cardas*, *Hundling*, *Eames*, and *Wall*. *Commonwealth* v. *Wall* follows *Eames*, *Chancy Park*, and *Hull* v. *Ruggles*, 56 N. Y. 424, in addition to *Yellow-Stone Kit*. And *Griffith Amusement Co.* also follows *Cross*, *Hundling*, *Cardas* and *Eames*. The *Eames* and *Hundling* cases for good measure also rely on *People* v. *Mail & Express*, 179 N. Y. S. 640, affd., 231 N. Y. 586, 132 N. E. 898, and the *Rock-Ola* case on *People* v. *Shafer*, 160 Misc. 174, 289 N. Y. S. 649, affd., 273 N. Y. 475, 6 N. E. 2d 410, N. Y. cases where the statute requires a valuable consideration.

Finally, *Post Publishing Co.* v. *Murray*, 230 Fed. 773 (C. A. 1), cert. den., 241 U. S. 675, should be added. In that case, a newspaper published headless photographs of women shoppers, who might, upon identifying themselves, come to the newspaper and receive $5. The court somewhat casually dismissed the scheme as playful. It found little or no chance, and no intent to induce members of the public into buying anything, which it stated to be the critical element, although the circulation of the paper might be increased. Obviously,

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183 A. 590, a bastion of the line, the court was careful to point out that the particular statute involved required a valuable consideration and that cases under broader statutes were to be distinguished. But this case was nevertheless uncritically followed as a general statement of the law. A number of the cases, including *Yellow-Stone Kit* v. *The State, supra,* recognized that the essential difference between a lottery and a non-lottery was whether the scheme was a gratuitous offering, but failed to look at the scheme itself to see whether a true gift was involved. See, e. g., *State* v. *Hundling,* 220 Iowa 1369, 264 N. W. 608; *Cross* v. *The People,* 18 Colo. 321.

Thus, aside from the decisions in those states, such as New York and California, which have statutes in terms requiring a valuable or pecuniary consideration, the line of cases applying this requirement as a general principle of law go back to the Alabama case of *Yellow-Stone Kit* v. *State, supra,* and frequently follow cases construing dissimilar statutes without discrimination. See *State ex rel. Draper* v. *Lynch,* 192 Okla. 497, 137 P. 2d 949, discussing the authorities. Even in Alabama, however, Bank Night has since been held to a a lottery under a broad statute [43] similar to Section 1304, on

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the schemes to which the Commission's rules apply are designed to induce the "give-away" program listeners to buy the products advertised over those programs.

[43] The Alabama statute forbids "any lottery or device of like kind, or any gift enterprises, or any scheme in the nature of a lottery or gift enterprise." Code 1923, § 4247.

the theory that the plan was intended to fill the theater. *Grimes* v. *State,* 235 Ala. 192, 178 So. 73.

Congress has wisely not attempted a limiting definition of lotteries and similar schemes. It did not limit the proscription of Section 1304 to the precise forms lotteries had thus far taken, but specifically included all similar schemes which provoke the same mischief. The language of the law—"lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance"—aptly fulfills its purpose of keeping pace with all schemes "savoring of a lottery."[44] There is thus no question here of expanding the statutory language to include schemes that previously were not included. It may not be practically possible to write a comprehensive detailed definition which will spell out the multitudinous forms lotteries have been and will be given.[45] But this does not mean that the statute is deprived of force with respect to new schemes conceived after its enactment, but within its principles. The fact that a particular scheme may

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[44] See S. Rep. 10, Part 1, on S. 2982, 60th Cong., 1st Sess., p. 22, referring to the revision and consolidation of the Penal Code in 1909 "so as to bring within the operation of the section all schemes savoring of a lottery." The section referred to (214) contained the language of 18 U. S. C. 1304.

[45] See *Equitable Loan & Security Co.* v. *Waring*, 117 Ga. 599, 44 S. E. 320; *Iris Amusement Corp.* v. *Kelly*, 366 Ill. 256, 8 N. E. 2d 648; *State ex rel. Hunter* v. *Omaha Motion Picture Exhibitors Assn.*, 139 Neb. 312, 297 N. W. 547; *State* v. *Lipkin*, 169 N. C. 265, 84 S. E. 340, on the futility of overprecise legislative definition.

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be novel, and have come into existence after the enactment of the governing statute, does not put it beyond the reach of the law.[46] And as was said by this Court of the term "unfair competition," "Neither the language nor the history of the [Federal Trade Commission] Act suggests that Congress intended to confine the forbidden methods to fixed and unyielding categories." *Federal Trade Commission* v. *Keppel,* 291 U. S. 304, 310.

Consideration is not in terms a requisite of a lottery or similar scheme under Section 1304. To the extent that it has become a recognized element in such schemes, it is fully satisfied by the Commission's carefully drawn rules. The rules at issue proscribe only those schemes which are designed to "buy" a radio or television audience with the lure of prizes distributed by chance. The consideration received by the promoter of such schemes is obvious; the consideration supplied through the time and effort[47] of the partici-

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[46] *United States* v. *Jefferson,* 134 F. 299 (C. C., W. D. Ky.); *Seidenbender* v. *Charles,* 4 Sergeant & Rawle 151, 8 Am. Dec. 682; *Troy Amusement Co.* v. *Attenweiler,* 64 Ohio App. 105, 28 N. E. 2d 207; *State ex. rel. Evans* v. *Brotherhood of Friends,* 41 Wash. 2d 133, 247 P. 2d 787.

[47] Judge Clark pointed out that in the aggregate the time required of participants in give-away schemes is considerable in quantity, and extremely valuable to the station and program sponsor (R. 134):

"What they [station and sponsor] are doing is to purchase time to advertise and vend their wares—indeed the most valuable time conceivable, as is alleged in the papers before us and conceded by all. The time spent by a single listener

pants and the eventual purchase by them of the sponsor's product may be less obvious. It is no less real.

The view reflected in the Commission's rules with respect to the element of consideration in lotteries and similar schemes was cogently stated over 50 years ago by Judge John L. Thomas, a former Assistant Attorney General for the Post Office Department in his authoritative treatise on lotteries:

> The general rule relative to the consideration in schemes of this class, deducible from the adjudged cases and the elementary principles, may be formulated as follows: Where a promoter of a business enterprise, with the evident design of advertising his business and thereby increasing his profits, distributes prizes to some of those who call upon him or his agent, or write to him or his agent, or put themselves to trouble or

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may be quite brief. But the time spent by the whole country in hanging for an hour more or less breathlessly upon a nationwide broadcast which may (but probably will not) yield the listeners returns ranging from refrigerators, pianos, and trips to South America to good hard cash beyond their wildest dreams provides so stupendous an audience for the advertising message as hardly to be estimated. And I suspect that the time spent by any single listener is almost always considerable. A few fleeting moments will not be adequate to learn what the rules are, hear and guess the tune or the answer to the question, and accept and answer the fateful telephonic inquiry. One is just impelled to hear the hour out, and, having gotten the hang of it, to come back the following week, and have the family listen as part of the game until the announcer calls."

> inconvenience, even of a slight degree, or perform some service at the request of and for the promoter, the parties receiving the prize to be determined by lot or chance, a sufficient consideration exists to constitute the enterprise a lottery though the promoter does not require the payment of anything to him directly by those who hold chances to draw prizes. [Lotteries, Frauds, and Obscenity in the Mails, p. 35.] [48]

Appellees may urge that 18 U. S. C. 1304 should be given the most restrictive possible interpretation because it is a criminal statute. Whatever the relevance of the strict construction doctrine where, as here, the statute is not being invoked with criminal sanctions in view, it is clear that the doctrine cannot be used to vitiate an intention of Congress to secure broad coverage where such an intention is clearly expressed.[49] It is hard to

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[48] And there has been no significant departure from this position by the Post Office Department to this day. The most recent Postal Bulletin on the subject declares that there is adequate consideration in "an expenditure of substantial effort or time," and limits this principle only as it is cast in doubt by the decision here under appeal and by *Garden City Chamber of Commerce* v. *Wagner*, 100 F. Supp. 769 (E. D. N. Y.). Excerpt from Postal Bulletin No. 19642, June 4, 1953, Appendix C, p. 76.

[49] *United States* v. *Halseth*, 342 U. S. 277, relied upon by the majority below (R. 124), is not in point here. It was there held that certain paraphernalia which had been sent through the mails was not part of an existing lottery, although it might later be so used. There is no such defect here. The radio give-away schemes are presently existing lotteries which are consummated during the programs.

see how Congress could have manifested such an intention more clearly than by the use of the term "other similar schemes". The recent decision of this Court in *United States* v. *Alpers,* 338 U. S. 680, is closely in point. In construing a similar comprehensive phrase in an obscenity statute ("or other matter of indecent character"), the Court quoted with approval the statement in *Gooch* v. *United States,* 297 U. S. 124, 128, that "while penal statutes are narrowly construed, this does not require rejection of that sense of the words which best harmonizes with the context and the end in view." And see *Northern Securities Co.* v. *United States,* 193 U. S. 197; *Kordel* v. *United States,* 335 U. S. 345.

It may also be urged that the Commission's rules represent an improper attempt to control what programs the public is to hear or see, that the Commission has no justification for imposing its views on this field on either broadcasters or the listening public, and that there is no occasion to "protect" the people from themselves. The difficulty with that line of argument is that it goes to the heart of anti-lottery legislation; it is a criticism properly directed to 18 U. S. C. 1304, rather than to the Commission's rules. The Congress has made the judgment—whether rightly or wrongly—that lotteries and similar schemes should not be broadcast. That policy must be fully and fairly carried out until and unless the

Congress alters it. As Judge Clark aptly stated (R. 135–136):

> If people want to waste their time in listening to radio programs in the hope or off-chance of winning some valuable prizes, why not let them do it. That is a widespread attitude with which, of course, I have considerable sympathy. But I think we should draw the line when it goes so far as to make a joke of an existing law, to turn an understandable, if unliked, prohibition into one which is unintelligible.

It is respectfully submitted that the judgment below does, indeed, make unintelligible the existing law against the broadcast of lotteries and other similar schemes. That judgment should not be allowed to stand.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed insofar as it enjoins enforcement of portions of the Commission's rules. The cases should be remanded to that court with directions to dismiss the complaints.

Respectfully submitted.

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APPENDIX A

The following is believed to be a substantially complete list of the anti-lottery provisions contained in the Constitutions of the States and in the Statutes of the States and Territories.

I. Constitutions

Alabama—Section 65 of the Constitution of Alabama.

Arkansas—Article XIX, section 14 of the Constitution of Arkansas.

California—Article IV, section 26 of the Constitution of California.

Colorado—Article XVIII, section 2 of the Constitution of Colorado.

Delaware—Article II, section 17 of the Constitution of Delaware.

Florida—Article III, section 23 of the Constitution of Florida.

Georgia—Article II, section 204 of the Constitution of Georgia.

Idaho—Article III, section 20 of the Constitution of Idaho.

Illinois—Article IV, section 27 of the Constitution of Illinois.

Indiana—Article XV, section 8 of the Constitution of Indiana.

Iowa—Article III, section 28 of the Constitution of Iowa.

Kansas—Article XV, section 3 of the Constitution of Kansas.

Kentucky—Section 226 of the Constitution of Kentucky.

Louisiana—Article XIX, section 8 of the Constitution of Louisiana.

Maryland—Article III, section 36 of the Constitution of Maryland.

Michigan—Article V, section 33 of the Constitution of Michigan.

Minnesota—Article IV, section 31 of the Constitution of Minnesota.

Mississippi—Article IV, section 98 of the Constitution of Mississippi.

Missouri—Article XIV, section 10 of the Constitution of Missouri.

Montana—Article XIX, section 2 of the Constitution of Montana.

Nebraska—Article III, section 24 of the Constitution of Nebraska.

Nevada—Article IV, section 24 of the Constitution of Nevada.

New Jersey—Article IV, section 7, paragraph 2 of the Constitution of New Jersey.

New York—Article I, section 9 of the Constitution of New York.

North Dakota—Article I, Amendments to Constitution of North Dakota.

Ohio—Article XV, section 6 of the Constitution of Ohio.

Oregon—Article XV, section 4 of the Constitution of Oregon.

Rhode Island—Article IV, section 12 of the Constitution of Rhode Island.

South Carolina—Article XVII, section 7 of the Constitution of South Carolina.

South Dakota—Article III, section 25 of the Constitution of South Dakota.

Tennessee—Article XI, section 5 of the Constitution of Tennessee.

Texas—Article III, section 47 of the Constitution of Texas.

Utah—Article VI, section 28 of the Constitution of Utah.

Virginia—Article IV, section 60 of the Constitution of Virginia.

Washington—Article II, section 24 of the Constitution of Washington.

West Virginia—Article VI, section 36 of the Constitution of West Virginia.

Wisconsin—Article IV, section 24 of the Constitution of Wisconsin.

II. Statutes

Alabama—The Code of Alabama 1941, Title 14, secs. 275–282.

Alaska—48 U. S. C., 77. Comp. Laws of Alaska 1949, pars. 4-2-1; 65-13-1 et seq.

Arizona—Code 1939, Title 43-2706.

Arkansas—Arkansas Stat. 1947. 41-2024; 41-2029.

California—Penal Code 1941, secs. 319 et seq.

Canal Zone—Crim. Code, sec. 471.

Colorado—1935 Stat. Ann., ch. 104, secs. 1 et seq.

Connecticut—The General Stat. of Connecticut. Revision of 1949, secs. 8667 et seq.

Delaware—Delaware Code Ann., Title 11, secs. 661 et seq.

District of Columbia—District of Columbia Code (Ann.), 1951 Ed. Secs. 22-1501 et seq.

Florida—Florida Stat. Ann., secs. 849.09 et seq.
Georgia—Code of Georgia Ann., secs. 26.6501 et seq.
Hawaii—48 U. S. C. 562. Organic Act, sec. 55. Rev. Laws of Hawai, 1945. Secs. 11.340–2; 11.349.
Idaho—Idaho Code. Ch. 49, secs. 18–4901 et seq.
Illinois—Smith-Hurd Ill. Ann. Stat. ch. 38, secs. 406 et seq.
Indiana—Stat. 1933, secs. 10–2301 et seq.
Iowa—Iowa Code Ann. 726.41 et seq.
Kansas—General Stat. of Kansas Ann. 1949, secs. 21.1501 et seq.
Kentucky—Kentucky Rev. Stat. 1953. Secs. 436.360 et seq.; 436.420.
Louisiana—Louisiana Rev. Stat. of 1950, secs. 740–90.
Maine—Rev. Stat. 1944, ch. 126, secs. 18–20 et seq.
Maryland—The Ann. Code of Maryland. Art. 27, sec. 423 et seq.
Massachusetts—General Laws of Massachusetts 1932, ch. 271, sec. 7 et seq.
Michigan—Michigan Stat. Ann. Secs. 28: 604 et seq.
Minnesota—Stat. Ann. Secs. 614.01 et seq.
Mississippi—Mississippi Code 1942. Secs. 2270 et seq.
Missouri—Rev. Stat. Ann. Sec. 4704 et seq.
Montana—Rev. Code of Montana. 1947 Ann. Secs. 94.3001 et seq.
Nebraska—Rev. Stat. of Nebraska, secs. 28.961 et seq.
Nevada—Nevada Comp. Laws. Secs. 10176 et seq.
New Hampshire—Rev. Laws of 1942, ch. 47, secs. 1 et seq.

New Jersey—New Jersey Stat. Ann. Secs. 121–1; 2: 147–1 et seq.

New Mexico—New Mexico Stat. 1941, secs. 41–2213 et seq.

New York—McKinney's Cons. Laws of New York 1951, Penal Law, secs. 1370 et seq.

North Carolina—The General Stat. of North Carolina of 1943, secs. 14.289 et seq.

North Dakota—North Dakota Rev. Code of 1943, secs. 12.2401 et seq.

Ohio—Page's Ohio General Code Ann., secs. 13063 et seq.

Oklahoma—Stat. Ann. 1938, Title 21, secs. 1051 et seq.

Oregon—Oregon Comp. Laws Ann., 23–1001 et seq.

Pennsylvania—Purdon's Pennsylvania Stat. Ann., 18.4601 et seq.

Rhode Island—General Laws 1938, ch. 612, secs. 1 et seq.

South Carolina—Code of Laws of South Carolina 1952, secs. 16.501 et seq.

South Dakota—South Dakota Code of 1939, secs. 24.0201 et seq.; 24.9906 et seq.

Tennessee—Ann. Code of Tennessee 1934, secs. 11.302 et seq.

Texas—Vernon's Ann. Stat. of the State of Texas Penal Code, secs. 654 et seq.

Utah—Code Ann. 1953, secs. 76–27–9 et seq.

Vermont—The Vermont Stat. Revision of 1947, secs. 8545 et seq.

Virginia—Code of Virginia 1950, secs. 18–276; 18–301 et seq.; 19–11.

Washington—Rev. Code of 1952, sec. 9.59.010 et seq.

West Virginia—The West Virginia Code of 1949, secs. 6104 et seq.

Wisconsin—Stat. 1951. Secs. 348.01 et seq.

Wyoming—Wyoming Comp. Stat. Ann., secs. 9.815 et seq.

APPENDIX B

Decisions of State Courts on the Legality of Bank Night Type Schemes

1. DECISIONS HOLDING BANK NIGHT AND KINDRED SCHEMES ILLEGAL

Alabama—*Grimes* v. *State,* 235 Ala. 192, 178 So. 73.

Connecticut—*State* v. *Dorau,* 124 Conn. 160, 198 A. 573.

Delaware—*Affiliated Enterprises, Inc.* v. *Waller,* 40 Del. 28, 5A. 2d 257.

Florida—*Little River Theatre Corp.* v. *State ex rel. Hodge,* 135 Fla. 854, 185 So. 855.

Georgia—*Jorman* v. *State,* 54 Ga. App. 738, 188 S. E. 925; *Barker* v. *State,* 56 Ga. App. 705, 193 S. E. 605.

Illinois—*Iris Amusement Corp.* v. *Kelly,* 366 Ill. 256, 8 N. E. 2d 648.

Kansas—*State ex rel. Beck* v. *Fox Kansas Theatre Co.,* 144 Kan. 687, 62 P. 2d 929.

Louisiana—*Shanchell* v. *Lewis Amusement Co.,* 171 So. 426.

Massachusetts [1]—*Commonwealth* v. *Wall,* 295 Mass. 70, 3 N. E. 2d 28; *Commonwealth* v. *Heffner,* 304 Mass. 521, 24 N. E. 2d 508; *Commonwealth* v. *McLaughlin,* 307 Mass. 230, 29 N. E. 2d 821.

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[1] Under the Massachusetts rule, determination of the fact question of whether the chance is paid for remains open in each case.

Michigan—*Sproat-Temple Theatre Corp.* v. *Colonial Theatrical Enterprise, Inc.,* 276 Mich. 127, 267 N. W. 602; *United-Detroit Theatres Corp.* v. *Colonial Theatrical Enterprise, Inc.,* 280 Mich. 425, 273 N. W. 756.

Minnesota—*State* v. *Schubert Theatre Players Co.,* 203 Minn. 366, 281 N. W. 369.

Missouri—*State* v. *McEwan,* 343 Mo. 213, 120 S. W. 2d 1098.

Montana—*State ex rel. Dussault* v. *Fox Missoula Theatre Corp.,* 110 Mont 441, 101 P. 2d 1065.

Nebraska—*State ex rel. Hunter* v. *Fox Beatrice Theatre Corp.,* 133 Neb. 392, 275 N. W. 605; *State ex rel. Hunter* v. *Omaha Motion Picture Exhibitors Assn.,* 139 Neb. 312, 297 N. W. 547.

New Jersey—*Furst* v. *A. & G. Amusement Co.,* 128 N. J. L. 311, 25 A. 2d 892.

New Mexico—*State* v. *Jones,* 44 N. M. 623, 107 P. 2d 324.

New York—*People* v. *Miller,* 271 N. Y. 44, 2 N. E. 2d 38.

Ohio—*Troy Amusement Co.* v. *Attenweiler,* 64 Ohio App. 105, 28 N. E. 2d 207, affd. 137 Ohio St. 460, 30 N. E. 2d 799.

Oklahoma—*State ex rel. Draper* v. *Lynch,* 192 Okla. 497, 137 P. 2d 949.

Oregon—*McFadden* v. *Bain,* 162 Ore. 250, 91 P. 2d 292.

Pennsylvania—*Commonwealth* v. *Lund,* 142 Pa. Super. 208, 15 A. 2d 839, allocatur refused 142 Pa. Super. xxxi.

Texas—*City of Wink* v. *Griffith Amusement Co.,* 129 Tex. 40, 100 S. W. 2d 695; *State* v. *Robb & Rowley United,* 118 S. W. 2d 917 (Civil App.); *Cole* v. *State,* 133 Tex. Cr. R. 548, 112 S. W. 2d 725.

Vermont—*State* v. *Wilson,* 109 Vt. 349, 196 Atl. 757.

Washington—*State* v. *Danz,* 140 Wash. 546, 250 Pac. 37; *Society Theatre* v. *Seattle,* 118 Wash. 258, 203 Pac. 21.

West Virginia—*State* v. *Greater Huntington Theatre Corp.,* 133 W. Va. 252, 55 S. E. 2d 681.

Wisconsin—*State ex rel. Cowie* v. *La Crosse Theaters Co.,* 232 Wis. 153, 286 N. W. 707; *Stern* v. *Miller,* 239 Wis. 41, 300 N. W. 738.

2. DECISIONS HOLDING BANK NIGHT AND KINDRED SCHEMES LEGAL

California—*People* v. *Cardas,* 137 Cal. App. 788, 28 P. 2d 99.

Florida—*Dorman* v. *Publix-Saenger-Sparks Theatres, Inc.,* 135 Fla. 284, 184 So. 886.[2]

Iowa—*State* v. *Hundling,* 220 Iowa 1369, 264 N. W. 608; *St. Peter* v. *Pioneer Theatre Corp.,* 227 Iowa 1391, 291 N. W. 164.

Minnesota—*Albert Lea Amusement Corp.* v. *Hanson,* 231 Minn. 401, 43 N. W. 2d 249.[3]

New Hampshire—*State* v. *Eames,* 87 N. H. 477, 183 Atl. 590.

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[2] This case, decided before *Little River Theatre Corp.* v. *State ex rel. Hodge, supra,* held that there was no lottery under the particular facts in the declaration.

[3] This case appears to be irreconcilable with *State* v. *Schubert Theatre Players Co., supra,* although the earlier decision was not overruled.

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New York—*People* v. *Shafer,* 160 Misc. 174, 289 N. Y. S. 649, affd., 273 N. Y. 475, 6 N. E. 2d 410; *Simmons* v. *Randforce Amusement Corp.,* 162 Misc. 491, 293 N. Y. S. 745.[4]

Rhode Island—*State* v. *Big Chief Corp.,* 64 R. I. 448, 13 A. 2d 236.[5]

South Carolina—*Darlington Theatres* v. *Coker,* 190 S. C. 282, 2 S. E. 2d 782.

Tennessee—*State ex rel. District Atty. Gen.* v. *Crescent Amusement Co.,* 170 Tenn. 351, 95 S. W. 2d 310.

Texas—*Griffith Amusement Co.* v. *Morgan,* 98 S. W. 2d 844 (Tex. Civ. App.).[6]

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[4] But see *People* v. *Miller, supra,* holding Bank Night illegal where evidence of free participation was rejected by the trial court on grounds of credibility.

[5] A decision failing to determine the applicable legal test because of inadequate facts in the record.

[6] This decision appears to be inconsistent with the other Texas decisions holding Bank Night illegal.

APPENDIX C

Excerpt From Postal Bulletin No. 19642, of June 4, 1953

INSTRUCTIONS OF THE SOLICITOR

RULINGS ON LOTTERIES, GIFT ENTERPRISES, ETC.

In the Postal Bulletin of February 13, 1947, the following statement was made of the position of the Office of the Solicitor respecting the element of consideration in a lottery:

> "In order for a prize scheme to be held in violation of this section (36.6, P. L. & R., 1948), it is necessary to show (in addition to the fact that the prizes are awarded by means of lot or chance) that the 'consideration' involves, for example, the payment of money for the purchase of merchandise, chance or admission ticket, or as payment on an account, or requires an expenditure of substantial effort or time. On the other hand, if it is required merely that one's name be registered at a store in order to be eligible for the prize, consideration is not deemed to be present."

There have been two recent decisions in the Federal courts dealing with the question of consideration in a lottery: *Garden City Chamber of Commerce* v. *Wagner*, 100 Fed. Supp. 769, wherein it was held that a requirement that participant visit a number of stores to determine if his number is posted in one of the store windows, thereby entitling him to a prize, does not constitute a con-

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sideration for a prize, and that such a scheme is therefore not a lottery; *American Broadcasting Co., Inc., et al.* v. *Federal Communications Commission,* 110 Fed. Supp. 374, dealing principally with requirements of listening to the radio or watching television programs.

This office will continue to hold that the element of consideration is present in a prize scheme when a substantial expenditure of time and effort is involved. However, in view of the court decisions referred to, this office must reverse its rulings which have held consideration to be present in the following and similar situations: where the sole requirement for participation is registration at a store and, in addition, attendance at a drawing or a return to the store to learn if one's name was drawn; visiting a number of stores, or a number of different locations in a store, to ascertain whether or not one's name or number has been posted; witnessing a demonstration of an appliance or taking a demonstration ride in an automobile, etc.

Postmasters should therefore exercise caution in applying previous rulings of this office in prize plans involving consideration only in "time and effort" expended. If there is doubt with respect to any of these questions, the matter should be submitted to the Solicitor so that a definite ruling may be made thereon.

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